Supreme Court, U.S.
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No. 93-998

In The

Supreme Court of the United States

October Term, 1993

ALICE LESHER,

Petitioner,

vs.

GEAUGA COUNTY DEPARTMENT OF HUMAN SERVICES,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio State Supreme Court

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On September 25, 1990, Respondent Geauga County Department of Human Service (hereinafter referred to as "Respondent") filed a complaint alleging that Katherine Doyle, the child of Petitioner Alice Lesher (hereinafter referred to as "Petitioner"), was an abused child. It was alleged that the child's stepfather, Charles Lesher, touched her breasts on approximately five separate occasions.

Petitioner and Robert Doyle, Katherine Doyle's natural father, had previously entered into a joint custody agreement. On September 20, 1990, Robert Doyle moved to modify the joint custody of Katherine based on the child sexual abuse allegations.

Petitioner, on September 26, 1990, requested that a complete social history and mental examination be performed prior to the adjudication of the complaint. On October 10, 1990, the trial court ordered Katherine and her parents and stepfather to submit to psychological evaluations. The court also ordered mental examinations of the parties after being advised that both the mother and father of the child concurred on October 22, 1990.

The trial court subsequently granted two separate motions by Petitioner for continuances of the adjudicatory hearing. The adjudicatory hearing was finally held on April 15, 1991, after which the trial court, based upon all of the relevant evidence, found Katherine to be a sexually abused child. After the hearing, the court heard Robert Doyle's motion for a change of custody.

By agreement of all the parties, the trial court held the disposition hearing on the following day, April 16, 1991. At the conclusion of the hearing and based upon all of the relevant evidence, the trial court awarded sole custody of Katherine to her natural father, Robert Doyle. The Court further ordered that restricted and supervised visitation be allowed between Petitioner and Katherine. The transcript of the proceedings were taken through the videotape medium.

Petitioner filed a timely appeal to the Ohio Court of Appeals Eleventh District. On December 21, 1992, the court, however, found all the Petitioner's assignments of error without merit and therefore affirmed the trial court's judgment.

Petitioner thereafter sought to further appeal this matter with the Ohio Supreme Court. That Court however, refused to hear the case for the reason that no substantial constitutional question existed. Petitioner now petitions this Court for a Writ of Certiorari.

SUMMARY OF ARGUMENT

Petitioner apparently seeks review by this Honorable Court, via a Writ of Certiorari, of both the refusal by the Ohio State Supreme Court to hear her appeal, and the decision of Ohio State Eleventh District Court of Appeals affirming the decision of the trial courts.

She raises one, and only one, argument stemming from the underlying case, and that is Question #1 concerning due process rights. The remaining issues raised

by petitioner, i.e., questions 2, 3, 4, and 5 have no relation to the underlying case at bar, nor any decisions relative thereto. In this vein it must be noted that petitioner has never filed any type of civil rights claim, calling into question the concerns she now wishes this Court to hear. To raise these matters in the present forum via a petition for a Writ of Certiorari is completely baseless.

Moreover, and concerning Petitioner's Due Process claim, same is simply a false and sham contention, designed to disguise Petitioner's mistakes at the appellate level.

There remains no issue whatsoever for review by this Court.

ARGUMENT

I. The issue of whether an Appellate Court's failure to decide an assignment of error that a judgment was against the manifest weight of the evidence due to a lack of written transcript, cannot be reached, since no such assignment of error was ever asserted.

On April 15, 1991, the Geauga County Juvenile Court held an adjudicatory hearing, with sufficient notice to all parties involved, and based on the relevant evidence presented, found Katherine Doyle to be an abused child. Thereafter, Katherine's mother, Alice Lesher, appealed such finding, and the resultant disposition to the Ohio Eleventh District Court of Appeals. In her brief, filed on August 12, 1991, Ms. Lesher asserted four (4) assignments of error, each assignment delineating issues presented for

review. (See Appendix 1, Table of Contents and Assignments of Error, Petitioner's Appellate Brief.) At no point in any of those proceedings has Petitioner ever asserted that the trial court's findings were "against the manifest weight of the evidence." For Petitioner to make such a claim to the Ohio State Supreme Court, and now to this Honorable Court, is simply her attempt to cover her own mistakes.

Moreover, pursuant to Rule 9(A) of the Ohio Rules of Appellate Procedure, when assignments of error allege specific instances of incorrect rulings by a trial court, the court of appeals may dismiss those assignments of error if the appellant has failed to type or print portions of a transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs when the transcript of the trial court's proceedings is in the videotape medium.

The transcripts of the instant case were in the videotape medium. Petitioner, upon appeal to the Ohio Eleventh District Court of Appeals, failed to follow the mandates of App. R. 9(A) which provides in part:

> When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented and append such copy of the portions of the transcript to their briefs.

The court of appeals agreed that the Petitioner's assignments of error would require a review of the videotape transcript since the arguments raised in those errors

refer to what occurred during the adjudicatory stage of the proceedings.

Petitioner asserts that it is not necessary under Ohio Appellate Rule 9(A) to include a written transcription of a videotaped transcript concerning an assignment of error that a judgment is against the manifest weight of evidence. A contention to the contrary cannot be disputed. In *City of Lorain v. Robertson* (1984), 21 Ohio App. 3d 93, syllabus, for example, the court held that a videotape need not be transcribed and appended to briefs when the error assigned alleges that a judgment is against the manifest weight of the evidence. In *all* other instances an appellant must transcribe and append to briefs the necessary portions of the videotape to demonstrate a particular error. (Emphasis added).

Petitioner has misconstrued the nature of her assignments of errors as she herself set forth. Both the Ohio Eleventh District Court of Appeals in the instant case and common sense mandate that Petitioner's assignments went to specific instances of incorrect rulings and not to a general "manifest weight of the evidence" argument. Petitioner put forth no clear, plain, or indisputable evidence which would have required the Court of Appeals to find an opposite conclusion to that of the trial court. Petitioner's allegations of error were specific and required a proper transcript of the videotapes to substantiate such claims.

Finally, Petitioner does not present a viable claim of due process deprivation. In alleging that the costs of having the transcript prepared "would be so dear as to

financially foreclose the right to appeal", and hence violate her due process rights, Petitioner fails to mention the alternatives which were available. Petitioner could very simply have submitted a "MOTION FOR AN ALLOWANCE OF TRANSCRIPT FEES" or sought an alternative way to cover any costs.

Petitioner, however, could show no attempts at securing the requisite transcript which were denied by the State, thereby depriving her of due process.

Such a contention is completely groundless and presents no viable issue for this Court's review.

II. Petitioner's remaining questions presented for review are inappropriate for consideration by this Court, in that they have no relation to the underlying case, and Petitioner has exhausted no other remedies by which to raise these matters.

Petitioner's remaining questions for review are rhetorical questions which bear no relation to the underlying case, *"In the Matter of Katherine Doyle,"* case number 90 JA 532, Geauga County, Ohio Juvenile Court. Petitioner acknowledges that the remainder of her questions stem from incidents occurring subsequent to the within case ("While this case was under appeal, in February, 1992 . . . " Petitioner's petition, page 12)

Petitioner has not heretofore alleged that her civil rights have been violated, has never filed any type of claim seeking clarification of these rhetorical questions, has no order from any Court upon which to seek a Writ of Certiorari, and has not sought to invoke the jurisdiction of this Court in any other way.

Absent allegations of error and constitutional issues, there is no matter herein presented for consideration by this Court.

CONCLUSION

The petition for a writ of certiorari must therefore be denied as Petitioner has presented no issue for review by this Court and the existence of no constitutional issue.

Respectfully submitted,

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January 21, 1994

APPENDIX 1

IN THE COURT OF APPEALS

ELEVENTH JUDICIAL DISTRICT OF OHIO

GEAUGA COUNTY, OHIO

CASE NO. 91-G-1643

IN THE MATTER OF KATHERINE DOYLE
ALLEGED ABUSED CHILD

APPEAL FROM THE COURT OF COMMON PLEAS
JUVENILE DIVISION
GEAUGA COUNTY, OHIO

BRIEF OF APPELLANT

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FIRST ASSIGNMENT OF ERROR 3

The Trial Court erred in consolidating the abuse proceeding with the changing custody proceeding.

FIRST ISSUE PRESENTED 3

1. The trial court had no jurisdiction to consolidate the abuse proceeding with the change of custody proceeding.

AUTHORITIES

In Re Gibson, 61 Ohio St. 3d 169 (1991) 3

Ohio Revised Code Chapter 2151 3

Civil Rule 1(c) 3

Civil Rule 42 3

Squires v. Squires, 12 Ohio App 3d 138 (1983) 3

SECOND ISSUE PRESENTED 3

2. A child abuse proceeding, as a special statutory proceeding, prevails over a change of custody proceeding, which is a general statutory proceeding.

AUTHORITIES

In Re Reese, 4 Ohio App 3d 59 (1982) 4

State, ex rel Johnson v. Perry County Court, 25 Ohio St 3d 6 (1986) 4

State v. Volpe, 38 Ohio St 3d 191 (1988) 4

State v. Chippendale, 52 Ohio St 3d 118 (1990) 4

THIRD ISSUE PRESENTED 4

3. The consolidation of a change of custody proceeding and a child abuse proceeding permits the use of inappropriate matters into the adjudicatory phase of the abuse proceeding.

AUTHORITIES

In Re Vickers Children, 14 Ohio App 3d 201 (1983) 4

In Re Sims, 13 Ohio App 3d 37 (1983) 4

O.R.C. Section 3109.04 5

Civil Rule 75 5

O.R.C. Section 2151.35(B)(1) 5

Juv Rule 32(A) 5

SECOND ASSIGNMENT OF ERROR 5

The trial court erred by ordering psychological examinations prior to the determination of the adjudicatory phase.

ISSUE PRESENTED

Psychological reports which contain matters relevant to the dispositional phase and which contain hearsay statements of an allegedly abused child are not permissible on the adjudicatory phase of a child abuse proceeding.

AUTHORITIES

Juv. R. 32(A)(3) 5

Davis v. Trumbull County, 24 Ohio App 180 (1985) 6

In Re Pitts, 38 Ohio App 3d 1 (1987) 6

Idaho v Wright, ___ US ___, 110 S. Ct. 3139 (1990) 6

THIRD ASSIGNMENT OF ERROR 6

The trial court erred in holding the dispositional hearing one (1) day after the adjudicatory hearing.

ISSUE PRESENTED FOR REVIEW 6

The *due process clause* of the Fourteenth Amendment to the *United States Constitution* requires that affected parties be given notice of the contents of a Case Plan sufficiently prior to the dispositional hearing so that they can effectively present their objections thereto.

AUTHORITIES

O.R.C. Section 2151.35(B)(1)..... 7

O.R.C. Section 2151.412..... 7

O.R.C. Section 2151.353(D)..... 7

Difford v. Secretary, Health and Human Services, 910 F 2d 1316 (CA6, 1990)..... 7

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Burns v United States, ___ US ___, 111 S. Ct. 1723 (1991) 8

Lankford v. Idaho, ___US ___, 111 S. Ct. 1723 (1991) 8

Mullane v. Central Hanover Bank and Trust Co. 339 U.S. 306 (1950) 8

Peralta v. Heights Medical Center, Inc., 485 U.S. 80 (1988) 8

FOURTH ASSIGNMENT OF ERROR 9

The trial court erred in finding the child an "abused" child.

FIRST ISSUE PRESENTED .....9[B]

1. A children's service agency is required to allege and prove under *Ohio Revised Code Section 2907.01(B)* that an alleged touching of an erogenous zone was for the purpose of sexual gratification or arousal.

AUTHORITIES

O.R.C. Section 2151.031(A) 9

O.R.C. Section 2907.01(C) 9

O.R.C. Section 2907.01(B) 9

United States v. Vuitch, 402 U.S. 62 (1971) 10

Vachur v. New Hampshire, 414 U.S. 478 (1974)..... 10

SECOND ISSUE PRESENTED 10

2. The inadvertent touching of the breast of a pre-pubertal eleven (11) year old girl cannot be considered by a reasonable person to be sexually arousing or gratifying.

AUTHORITIES

O.R.C. Section 2907.01(B) 10

State v. Astley, 36 Ohio App 3d 247 (1987) 10

State v. Baker, 50 Ohio App 2d 68 (1976) 11

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OHIO RULES OF APPELLATE PROCEDURE

Rule 9. The record on appeal

(A) Composition of the record on Appeal.

The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App. R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings in in [sic] the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to theire [sic] briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means.

(B) The transcript or proceedings; duty of appellant to order, notice to appellee if partial transcript is ordered. At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not

already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonogramic, or photographic means, by the use of audio electronic recording devices, or by the use of video recording systems. If there is no officially appointed reporter, App. R. 9(C) or 9(D) may be utilized. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of all evidence relevant to the findings or conclusion.

Unless the entire transcript is to be included, the appellant, with the notice of appeal, shall file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript that the appellant intends to include in the record, a statement that no transcript is necessary, or a statement that a statement pursuant to either App. R. 9(C) or 9(D) will be submitted, and a statement of the assignments of error the appellant intends to present on the appeal. If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.